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Supreme Court, U.S.
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No. (1)

In The
Supreme Court of the United States

FREDY HUGO PENA-MURIEL,
Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

RANDY OLEN, ESQ.
Counsel of Record
55 BRADFORD STREET
PROVIDENCE, RI 02903
(401) 274-1400
(401) 274-2480 FAX

Counsel for Petitioner

March 21, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

1. Whether the Court of Appeals erred in holding that the Board of Immigration Appeals lacked jurisdiction to entertain petitioner's motion to reopen.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Fredy Hugo Pena-Muriel respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

CITATION TO OPINIONS BELOW

The decision of the Immigration Judge and the Board of Immigration Appeals are unpublished, Matter of Pena-Muriel, A30-663-990. The opinion of the United States Court of Appeals for the First Circuit in this case, dated June 13, 2007, is published at 489 F.3d 438 (1st Cir. 2007). The petitions for rehearing and for rehearing en banc were denied on October 24, 2007 and are published at 510 F.3d 350 (1st Cir. 2007).

STATEMENT OF JURISDICTION

The Court of Appeals decided the petition for review on June 13, 2007, and denied the petitions for rehearing and for rehearing en banc on October 24, 2007. On January 9, 2008, Mr. Justice Souter extended the time for filing a petition for a writ of certiorari to and including March 22, 2008. The Court of Appeals had jurisdiction to review the decision of the Board of Immigration Appeals pursuant to Immigration and Nationality Act ("INA") §242, 8 U.S.C. §1252, as amended by the Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005) (RIDA). This Court has jurisdiction to review the judgment on a writ of certiorari pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

(Former) 8 U.S.C. § 1105a(c) (eliminated by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996))

> An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order...

8 C.F.R. § 1003.23(b)(1)

> ...A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his departure from the United States...

United States Constitution, Article V

> No person shall be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Petitioner is a native and citizen of Bolivia who entered the United States as a lawful permanent resident on September 27, 1970. He was convicted of Domestic Assault in the Providence, Rhode Island Sixth District Court in violation of R.I. Gen. Laws § 11-

5-3 and § 12-29-5 on February 19, 1997. Mr. Muriel received a one year suspended sentence.

Mr. Muriel was placed in removal proceedings and ordered removed on August 14, 1997, pursuant to INA § 237(a)(2)(E)(i) [8 U.S.C. § 1227 (a)(2)(E)(i)] as an alien convicted of a domestic violence offense. He did not appeal the order, and departed the United States. On March 22, 2002, Mr. Muriel's plea was vacated by the Rhode Island District Court in Providence, Rhode Island, when the alleged victim of the domestic assault recanted her allegations. On March 27, 2002, the prosecution dismissed all charges against Mr. Muriel.

On May 16, 2002, Mr. Muriel filed a motion to reopen his deportation proceedings based on the vacatur of his conviction. The Immigration Judge denied the motion due to lack of jurisdiction, basing his decision on 8 C.F.R. § 3.23(b)(1) (now 8 C.F.R. § 1003.23(b)(1)). The Board of Immigration Appeals issued a summary affirmance on February 6, 2003.

Mr. Muriel petitioned the United States District Court for the District of Massachusetts for a writ of habeas corpus. The petition was transferred to the First Circuit Court of Appeals as a petition for review pursuant to the May 11, 2005 enactment of the Real ID Act. The Court of Appeals denied the petition for review on June 13, 2007, and petitions for rehearing and for rehearing en banc on October 24, 2007. This petition for writ of certiorari follows.

STATEMENT OF THE FACTS

Petitioner Fredy Hugo Pena-Muriel (Muriel) is a native and citizen of Bolivia who entered the United States as an immigrant in 1970, at 16 months of age. Thereafter, he resided as a lawful permanent resident of the United States for 27 years. His family, including his child, mother, father, and two brothers are citizens of the United States, and he has dozens of other family members residing in the United States as citizens or lawful permanent residents.

On February 19, 1997, Mr. Muriel was convicted of domestic assault in the Providence, Rhode Island Sixth District Court, in violation of R.I. Gen. Laws §§ 11-5-3 and 12-29-5. He was sentenced to a one year term of imprisonment, which was suspended. The conviction was obtained as a result of the false allegation of the complaining witness, which was later recanted. As a result of this conviction, Mr. Muriel was placed in removal proceedings through the issuance of a Notice to Appear (NTA) dated July 17, 1997, charging him with being deportable as an alien convicted of a crime of domestic violence and an aggravated felony, pursuant to INA §§ 237(a)(2)(E)(i) and 237(a)(2)(A)(iii). On September 15, 1997, Mr. Muriel was ordered deported.

In March, 2002, Mr. Muriel filed an application for post-conviction relief in the Sixth District Court, when the complaining witness came forward and recanted her prior allegations. The court granted the application on March 22, 2002, and the criminal charge was subsequently dismissed.

Mr. Muriel then filed a motion to reopen his removal proceedings on May 8, 2002. On June 29, 2002, the motion was denied by an Immigration Judge (IJ). The IJ's decision was based exclusively on 8 C.F.R. § 3.23(b)(1) (now 8 C.F.R. § 1003.23(b)(1)), which states, in relevant part, that "a motion to reopen or reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States." On February 6, 2003, the Board of Immigration Appeals (BIA) summarily affirmed the IJ's decision, in an affirmance without opinion.

On May 28, 2003, Mr. Muriel filed a petition for writ of habeas corpus in the United States District Court for the District of Massachusetts, No. 03-1984-MEL, seeking review of the BIA's decision. On June 21, 2005, the case was transferred to the United States Court of Appeals for the First Circuit as a petition for review pursuant to § 106(c) of the Real ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (RIDA). The Court of Appeals denied the petition for review on June 13, 2007 and petitions for rehearing and for rehearing en banc on October 24, 2007. This petition for writ of certiorari follows.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE BOARD OF IMMIGRATION APPEALS LACKED JURISDICTION TO ENTERTAIN PETITIONER'S MOTION TO REOPEN

Petitioner Fredy Muriel, a native and citizen of Bolivia, was admitted to the United States as a lawful permanent resident alien in 1970, when he was one year and 4 months old. On August 14, 1997, after having lived in the United States for 27 years, he was ordered removed on the basis of a conviction for the offense of Domestic Assault, in violation of R.I. Gen. Laws §§ 11-5-3 and 12-29-5. He did depart the United States, and has been living abroad since that time.

Mr. Muriel's conviction, however, was based on fraudulent allegations that were later recanted by the complaining witness in a sworn affidavit. His conviction was duly vacated on March 22, 2002, and all charges against him were dismissed. Because the conviction that had formed the basis for the order to remove him to Bolivia in the first instance had been vacated, Mr. Muriel filed a motion to reopen his immigration proceedings. An Immigration Judge, however, denied the motion on the basis of 8 C.F.R § 3.23(b)(1) (now 8 C.F.R. § 1003.23(b)(1)), stating that "a motion to reopen may not be filed by or on behalf of a person who is the subject of removal, deportation or exclusion proceedings subsequent to his departure

from the United States."[1] The Board of Immigration Appeals issued a summary affirmance of that decision.

A. Because Mr. Muriel's Conviction Has Been Vacated on the Merits, It Cannot Properly Serve as the Basis For Removal

The vacatur of the underlying conviction that formed the basis of Mr. Muriel's 1997 deportation proceedings was on the merits, resulting in a clear defect in those proceedings which requires reopening. The First Circuit has held that "the overturning of a conviction upon which deportability was premised is an appropriate basis for reopening administrative proceedings." De Faria v. INS, 13 F.3d 422, 423 (1st Cir. 1993).

In De Faria, the Court of Appeals cited a number of cases approvingly for the proposition that administrative proceedings are appropriately reopened when the conviction upon which deportability is based is overturned. Id. at 423-24. See also Haghi v.Russell, 744 F. Supp. 249, 251 (D. Col. 1990) (holding that "[i]f there [was] no conviction, there [was] probably [also] no longer a basis for a deportation order ...", and remanding the case back to the BIA for reconsideration of the motion to reopen in light of the new evidence); Becerra-Jimenez v. INS, 829 F.2d 996, 1001 (10th Cir. 1987) (holding that evidence not available at the time of Petitioner's initial removal hearing, including the expungement of two of his

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[1] Matter of Pena-Muriel, A30-663-990, June 29, 2002, Decision of the Immigration Judge at 2.

criminal convictions, served as a basis for ordering the BIA to reopen proceedings on remand to hear evidence). One of the cases cited by the First Circuit, Wiedersperg v. INS, 896 F.2d 1179 (9th Cir. 1990), found that the BIA had abused its discretion in refusing to reopen administrative proceedings after petitioner's conviction had been vacated. "Where Congress has made deportability depend upon a state's action in convicting an alien of a state-defined crime, it offends no sense of symmetry to hold that a state's action vacating and totally nullifying that conviction should render the deportation not legally executed." Wiedersperg, 896 F.2d at 1182.

The position that the vacatur of a conviction that supports an order of deportation is a valid basis for reopening administrative proceedings is held by the Board of Immigration Appeals as well as all but one of the circuit courts. The BIA routinely terminates removal proceedings when the conviction upon which the charge was based is vacated. See Matter of Rodriguez-Ruiz, 22 I. & N. Dec. 1378, 1380 (BIA 2000). There, the BIA held specifically that after the conviction was properly vacated, there was "no current basis to find the respondent removable as charged." Rodriguez-Ruiz, 22 I. & N. at 1380. A vacatur that has been granted (1) on the merits, and (2) not as a result of a state rehabilitative measure, goes directly to the validity of any charge of deportability based on the vacated conviction, and must be considered an appropriate ground for a motion to reopen those proceedings. See, e.g., Alim v. Gonzalez, 446 F.3d 1239, 1244 (11th Cir 2006) (stating that to continue to consider a conviction that was vacated on appeal a conviction for immigration purposes is "so foreign, so

antithetical, to the longstanding principles underlying our criminal justice system and our notions of due process that we would expect Congress to have spoken very clearly if it intended to effect such results. It has not, however, done so"); Cruz-Garza v. Ashcroft, 396 F.3d 1125, 1129 (10th Cir. 2005) ("In sum, the treatment of vacated convictions is now fairly well-settled. Notwithstanding the Fifth Circuit's tenuous adherence to a categorical disregard of all vacaturs ... 'the rest of the nation' has [held a properly vacated conviction cannot support a charge of deportability]").

In Cruz v. Attorney General of the United States, 452 F.3d 240 (3rd Cir. 2006), the Ninth Circuit noted that even untimely motions to reopen are routinely granted, pursuant to the agency's sua sponte authority to reopen, where based on properly vacated convictions. Id. at 250 ("Should the Board determine on remand that Cruz is no longer 'convicted' under the INA, we would expect it to reopen his proceedings despite the untimeliness of his motion, as it has routinely done in other cases where a conviction was vacated under Pickering, or at least explain logically its unwillingness to do so.").

Mr. Muriel sought to have his conviction for domestic assault vacated following notification that the complaining witness had recanted her allegations. As a result of the new information and a dismissal of all charges against Mr. Muriel by the prosecution, the court granted the motion to vacate his conviction. According to De Faria, and authority cited therein, Mr. Muriel is entitled to have his administrative proceedings reopened in light of the new evidence that his underlying conviction has been vacated. Moreover,

the vacatur of the conviction is clearly effective for immigration purposes; the conviction was (1) granted on the merits, as the result of the revelation that the allegations that had garnered his conviction had been fraudulently offered, and (2) not on the basis of a rehabilitative measure. See Matter of Pickering, 23 I. & N. Dec. 621 (BIA 2003). Just as there were no grounds for Mr. Muriel's conviction, there are no grounds for his order of deportation. The validity of the deportation proceedings which resulted in Mr. Muriel's removal from the United States has been fatally undermined. The sole ground upon which his removal was based has been vacated. In order to correct the serious collateral consequences of his erroneous conviction, his removal proceedings must be reopened.

B. 8 C.F.R § 1003.23(b)(1) Does Not Bar Reopening Where The Motion to Reopen Is Based Upon A Vacated Conviction

Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208, Div. C, 110 Stat. 3009-626 (1996) (IIRIRA), INA § 106(c), 8 U.S.C. § 1105a(c) governed circuit court jurisdiction to review motions to reopen. The statute read, in pertinent part, that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien ... has departed from the United States after the issuance of the order." Before the 1996 enactment of IIRIRA, the circuits were split as to how to interpret the language of §106(c), specifically the word "departed". A number of circuits held that "departed" did not refer to those departures that were not legally executed or that were effected in violation of due process. See Mendez v. INS, 563 F.2d 956 (9th Cir.

1977); Estrada-Rosales v. INS, 645 F.2d 819 (9th Cir. 1981); Juarez v. INS, 732 F.2d 58 (6th Cir. 1984); Camacho-Bordes v. INS, 33 F.3d 26, 28 (8th Cir. 1994) (holding that there is jurisdiction to "review an order of deportation ... if the record reveals a colorable due process claim"); Marrero v. INS, 990 F.2d 772, 777 (3rd Cir. 1993) (same). Other circuits, including the First Circuit, have held that the language should be interpreted to provide an absolute bar to jurisdiction after an alien had departed the United States, regardless of the circumstances. See Baez v. INS, 41 F.3d 19 (1994); Roldan v. Racette, 984 F.2d 85, 90 (2d. Cir. 1993); Umanzor v. Lambert, 782 F.2d 1299 (5th Cir. 1986); Saadi v. INS, 912 F.2d 428, 428 (10th Cir. 1990).

In Mendez, the Petitioner was deported after his underlying conviction had been vacated, and without having had an opportunity to contact his counsel of record. Appellant's attorney filed a motion for reconsideration with the BIA, which was denied on jurisdictional grounds because Mendez had already "departed" the United States. The Ninth Circuit reversed, ordering the INS to readmit Mr. Mendez and grant him the same status that he had held prior to the defective deportation, in order to allow him to pursue appropriate administrative remedies. Id. at 959. In reaching its opinion, the court reasoned that it had "difficulty viewing appellant as falling within the statutory definitions of one who 'has departed the United States' or who has 'been deported in pursuance of law.'" Id. at 958.

The Ninth Circuit expounded on its Mendez holding in Estrada-Rosales v. INS, 645 F.2d 819 (9th Cir.

1981). There, the alien's conviction was vacated after his deportation, and the Board of Immigration Appeals denied his motion to reopen based upon the post-departure bar. In granting the petition for review, the court stated that "the regulation in turn is taken from the provision in the Immigration and Nationality Act which precludes judicial review of an order once an alien has 'departed' from the United States [8 U.S.C. § 1105a(c)]." Id. at 820. The court held that a deportation based upon an invalid conviction is "not 'legally executed'" and therefore "cannot now serve as a legitimate ground for deportation so as to foreclose reopening." Id. Similarly, in Wiedersperg v. INS, 896 F.2d 1179 (9th Cir. 1990), the court determined that it had jurisdiction to review the denial of the motion to reopen (based on the post-departure bar) where the motion was based on the vacatur of a conviction which occurred subsequent to the alien's deportation. Again noting that "the regulation takes its language from and operates parallel to 8 U.S.C. § 1105a(c)," the court affirmed the Mendez holding that the jurisdictional bars both to judicial review, pursuant to §1105a(c), and to reopening, pursuant to 8 C.F.R § 3.2, do not apply where the departure was not a "legally executed," one. 896 F.2d at 1180. The court determined that a deportation based upon a conviction which was later vacated on the merits is not "legally executed," and 8 C.F.R. § 3.2 therefore did not bar reopening. The holding has been extended to post- IIRIRA cases in which a conviction was vacated subsequent to the alien's departure from the United States. See Cardoso-Tlaseca v. Gonzales, 460 F.3d 1102, 1106 (9th Cir. 2006) (deportation based upon an invalid conviction which was vacated subsequent to deportation not "legally executed"; therefore, defective

deportation may be reopened after Petitioner's departure). The Third, Sixth, and Eighth Circuits have agreed that the courts have jurisdiction to review the colorable due process claim of an alien whether or not his deportation has already been effected. Marrero, 990 F.2d at 777; Juarez, 732 F.2d at 58; Camacho-Bordes, 33 F.3d at 28.

In its disagreement with these holdings in Baez v. INS, 41 F.3d 19 (1st Cir. 1994), the First Circuit found the prohibition on judicial review of an order of deportation where the alien had departed from the United States to be "absolute," reflecting "Congress's determination to eliminate repetitive and unjustified appeals." 41 F.3d at 22. The court determined that the "plain language of the statute prohibits judicial review of a deportation order once the order has been executed." Id. at 24.

As a result of the enactments in IIRIRA and RIDA, this statutory prohibition no longer exists. When Congress enacted § 1252(d), it eliminated the language that had previously existed in § 1105a(c) which barred judicial review after an alien had departed the United States. Section 1252 ("judicial review of orders of removal") replaced the pre-existing jurisdictional provisions; notably, the language regarding post departure judicial review was removed from the statute completely. Whatever the correctness of the First Circuit's decision in Baez may have been, it is no longer viable with the elimination of §1105a(c). Thus, any continued reliance on Baez as support for the continuing validity of the regulation is inappropriate.

C. 8 C.F.R § 1003.23(b)(1) Is No Longer Valid, as it Conflicts With 8 U.S.C. § 1252

The elimination of the prohibition on judicial review as a result of an alien's departure was an integral part of an overall goal of balancing more effective removal procedures with the demands of due process. Reinstatement of judicial review despite an alien's departure is consistent with this goal, as it reduces the potential for delay in executing a removal order while protecting the due process rights of the alien.

> The permanent rules now give courts the opportunity to make decisions on stay of removal without the overriding concern that removal will end the case. Effective use of that opportunity should further decrease the incentive to bring insubstantial claims for purposes of delay. Despite the seeming paradox, elimination of the departure rule facilitates both streamlined enforcement and judicial review.

Gerald L. Neuman, Symposium: Jurisdiction and the Rule of Law After the 1996 Immigration Act, 113 HARV. L. REV. 1963, 1995-97 (2000).

Thus, it is now well-settled that an alien's departure does not eliminate judicial review. See Leitao v. Reno, 311 F.3d 453 (1st Cir. 2002). See also Tapia-Garcia v. INS, 237 F.3d 1216, 1217 (10th Cir. 2001)("deportation no longer forecloses judicial review"); Moore v. Ashcroft, 251 F.3d 919, 922 (11th Cir. 2001) ("removal from the United States does not render [the petitioner's] case moot"); Ngarurih v.

Ashcroft, 371 F.3d 182, 192-93 (4th Cir. 2004) (8 U.S.C § 1252 "does not purport to cut off appellate jurisdiction once an alien leaves the country," and that "an alien may continue to prosecute his appeal of a final order of removal even after he departs the United States"); Patel v. Ashcroft, 378 F.3d 610, 612-13 (7th Cir. 2004) (holding that circuit court jurisdiction is barred after an alien departs the country only if the petition was filed under former § 1105a(c) or IIRIRA's transitional rules).

Furthermore, the REAL ID Act of 2005 further amended the jurisdictional provision, again broadening the jurisdiction for the courts of appeals to review final orders of removal when constitutional questions or questions of law remain. See Papageorgiou v. Gonzalez, 413 F.3d 356, 358 (3rd Cir. 2005) (holding that "Congress evidenced its intent to restore judicial review of constitutional claims and questions of law presented in petitions for review of final removal orders.") See also Boakai v. Gonzalez, 447 F.3d 1, 4 (1st Cir. 2006) (noting that the REAL ID Act broadened the jurisdiction of the courts of appeals to hear petitions for review filed by aliens convicted of aggravated felonies seeking relief under the Convention Against Torture). In sum, these statutory revisions evidence Congress' intent to organize and streamline the judicial review procedures, while at the same time clearly recognizing the necessity to protect noncitizens' due process rights to have their claims heard.

The BIA erred in relying on 8 C.F.R § 1003.23(b)(1) to deny petitioner's motion to reopen for lack of subject matter jurisdiction, because that regulation is

inextricably linked to a statute that has since been substantially amended, and no longer includes any mention of restrictions on post-departure jurisdiction. Thus, the regulation itself is no longer valid, as it is in clear conflict with 8 U.S.C. § 1252. Before IIRIRA was enacted, INA § 106(c), 8 U.S.C. § 1105a(c) governed circuit court jurisdiction to review motions to reopen. It read, "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien ... has departed from the United States after the issuance of the order." The Department of Justice duly passed regulations in conformity with the statute. 8 C.F.R. § 1003.2(d) (pertaining to the Board of Immigration Appeals) and § 1003.23(b)(1) (pertaining to immigration judges) both state that "[a] motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject matter of exclusion, deportation or removal proceedings subsequent to his or her departure from the United States."

These regulations forbid an alien from filing a motion to reopen, and ostensibly forbid the courts from considering such a motion, after the petitioner has departed the United States. The regulations were adopted in the same year as the enactment of §1105a(c), and contain the exact language of the statute. Now, there is no such language in §1252; yet the regulation has not been changed to reflect the new mandate from Congress. The Ninth Circuit held in Wiedersperg that 8 C.F.R. § 3.2 (now redesignated as §1003.2(d)) "takes its language from and operates parallel to" §1105a(c). 896 F.2d at 1180, n. 2. That the court equated the language of the regulation to the

language of the statute indicates the former's dependence on the latter for its relevance.

In its decision below, the First Circuit rejected the position that the elimination of §1105a(c) clearly expressed Congressional intent to invalidate the regulatory departure bar of 8 C.F.R. § 1003.23(b)(1) on motions to reopen. It further determined that the regulation was a reasonable interpretation of the statute, under the second step of Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984). The court concluded that the statutory change permitting post-departure appeals did not "remotely" support the argument that Congress also intended to permit post-departure motions to reopen.

The First Circuit's conclusion is contrary to the Congressional intent to streamline removal proceedings, while at the same time protecting the due process rights of aliens. Permitting noncitizens who have been deported to continue to press their claims subsequent to their departure eliminates the incentive to file frivolous appeals for the purpose of remaining in the United States. At the same time, those with meritorious claims are able to have them fully litigated, which vindicates due process concerns. This rationale is equally applicable to the motion to reopen context. It is not a reasonable interpretation, in light of the elimination of §1105a(c), to permit valid post-departure claims to proceed on judicial review, yet disallow similarly meritorious post-departure claims based solely on the post-departure regulation. The

regulation is in direct conflict with the amended statute, and must be invalidated.[2]

D. Mr. Muriel's Wrongful Deportation Violates Due Process

In this case, the specific facts of Mr. Muriel's case are compelling. He was convicted and subsequently deported based on a false presentation of facts. These facts were not corrected until over four years after his deportation. As a result, Mr. Muriel had no past opportunity to take appropriate measures to preserve his right to remain in the United States. In particular, he has never withstood removal proceedings with accurate criminal charges. He was rendered

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[2] In a decision rendered subsequent to the decision in this case, the United States Court of Appeals for the Fourth Circuit invalidated 8 C.F.R. §1003.2(d), the regulation banning post-departure motions to reopen before the Board of Immigration Appeals (the regulation at issue in this case, 8 C.F.R. §1003.23(b)(1), is a parallel regulation banning post-departure motions to reopen before an Immigration Judge; the language of the post-departure bar in both provisions is identical). The Fourth Circuit held that the regulation conflicted with the language of the statute governing motions to reopen, 8 U.SC. §1229(a)(c)(7)(A), as enacted by IIRIRA. That statute codified the regulations pertaining to motions to reopen, and did not include the post-departure bar in its codification. Thus, the Fourth Circuit held the regulation is invalid under step one of the Chevron analysis. See William v. Gonzales, 499 F.3d 329 (4th Cir. 2007).

In his petition for rehearing, Mr. Muriel raised the William decision and arguments supporting it. In the denial of the petition for rehearing, the First Circuit refused to address the argument on the ground that it was not raised in the original petition. See Pena-Muriel v. Gonzales, 510 F.3d 350 (1st Cir. 2007).

defenseless because of an unlawful criminal conviction. His present claim is to correct a clear injustice that was not remediable prior to his removal from the United States.

As a lawful permanent resident, Mr. Muriel is protected by the United States Constitution. See The Japanese Immigrant Case, 189 U.S. 86, 100-101 (1903) (alien has due process rights). His long-term residency and family ties to the United States heighten this protection. See Landon v. Plascencia, 459 U.S. 21, 32 (1982) (once an alien is admitted and develops ties that go with permanent residence his constitutional status changes accordingly). Mr. Muriel's constitutional rights are not minimized because he has suffered an unlawful conviction and baseless deportation. He continues to endure the prohibition against his return to the United States and the painful separation from his child and family. There are no grounds for his deportation and there is no basis for his continued unlawful exclusion from the United States.

The Due Process Clause of the Fifth Amendment provides that "No person shall ... be deprived of ...liberty without due process of law. This right to liberty is a fundamental interest." See Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action"). Mr. Muriel is actively restrained from maintaining his status as a lawful permanent resident, despite the fact that there was no basis for his removal. He sought to reopen his case to establish that his removal was unwarranted and illegal, and to demonstrate that there are no lawful

reasons that prevent his re-entry into the United States, so that he may rejoin his family and continue his permanent residency. This action is arbitrary and constitutes a due process violation.

Mr. Muriel is entitled to procedural due process measured by balancing: (1) his private interest affected by the government; (2) the risk the government will erroneously deprive him of that interest, and the value of additional or substitute procedural safeguards to prevent that from happening; and (3) the government's interest, including the fiscal and administrative burdens the additional or substitute procedural safeguards would impose. See Matthews v. Eldridge, 424 U.S. 319, 335 (1976). Mr. Muriel has been wrongfully stripped of his United States residency. This punishment has been characterized as a "sanction which in severity surpasses all but the most Draconian criminal penalties," Lok v. INS, 548 F2d 37 (2nd Cir. 1977), which "may result in the loss of 'all that makes life worth living'." Bridges v. Wixon, 326 U.S. 135, 147, 65 S.Ct. 1443 (1945) (quoting Ng Pho Ho v. White, 259 U.S. 276, 284, 42 S.Ct. 492 (1922)). The government has already erroneously deprived Mr. Muriel of his right to reside in the United States and he is further prevented from returning because of criminal penalties associated with an unlawful return. Therefore, the severity of his plight stems from the violation of the procedural safeguards of the Constitution.

This Court should note that the only expense to the government in this case would consist of an Immigration Judge making a routine administrative review of the case in order to determine the validity of

Mr. Muriel's removal order. As discussed *supra*, it is well-established that where a conviction is vacated, there is an appropriate basis for reopening deportation proceedings. See DeFaria v. INS, 13 F.2d 422, 423 (1st Cir. 1993). A vacated conviction will be recognized for immigration purposes if it is not pursuant to an expungement or rehabilitative statute, see Matter of Rodriguez-Ruiz, 22 I&N Dec. 1378 (BIA 2000), and if the vacatur was not solely for immigration purposes. See Matter of Pickering, 23 I&N Dec. 621 (BIA 2003). Here, the vacatur occurred because a fraud had been committed on the Court arising out of false allegations. This analysis is within the expertise of the Immigration Judge and is a task that the judge performs many times daily. The government will not be affected adversely by re-hearing this case. The slight allocation of resources necessary for this task is greatly outweighed by the irreparable harm that Mr. Muriel is suffering because of his unlawful deportation.

It is no answer to say, as the First Circuit did in its decision below, that Mr. Muriel's "removal proceeding came to a lawful conclusion before his conviction was vacated." 489 F.3d at 443. Nor does the fact that his motion to reopen was filed some years after his removal proceedings concluded; the fraud underlying the conviction simply did not come to light until that time, and he promptly vacated the conviction and sought reopening. While the goal of finality is a legitimate one, it cannot trump that of due process; a deportation which is based on a fraudulent, now-vacated conviction is repugnant to due process values.

Mr. Muriel's case represents a unique situation and requires the consideration of practical realities and due process concerns. Mr. Muriel's conviction has been vacated, but he still suffers from the penalty imposed as a result of that fraudulently obtained conviction. Due process requires that the penalty be lifted in keeping with the revelation of Mr. Muriel's innocence.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

Fredy Hugo Pena-Muriel
By His Attorney,

Randy Olen, Esq.
Counsel of Record
55 Bradford Street
Suite 203
Providence, RI 02903
(401) 274-1400
(401) 274-2480 (fax)